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Is Equality A Totally Empty Idea?

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Abstract: Comments on Westen article *The Empty Idea of Equality*. The only way we know what direction to move in making reductions and increases in burdens is to have a concept of equality in mind. The only way we can know that one burden is 'great' and another burden is 'considerably lesser,' to use the words in Westen's standard, is to compare the burdens. But comparison presupposes a measure of equality, for we cannot know that one burden is greater than another unless we first have a concept of when the two burdens are equal. Westen's standard, therefore, is logically posterior to the concept of equality. If we start with the Equal Protection Clause, then a standard such as Westen's, which he attempts to ground in substantive due process, can be given operative content.

Tags: Concept of Equality, Equal Protection Clause, Substantive Due Process

[pg600]** Professor Peter Westen's essay asserting that the concept of equality has no substantive content whatsoever usefully brushes aside much of the equal-protection rhetoric that, as Western carefully explains, appropriately belongs to substantive due process.[FN1] However, his absolutist position is open to challenge. I would like to posit one hypothetical case that I used in my classes when I taught Constitutional Law that I think contradicts Professor Westen's thesis. If it does, then there will be other cases as well, and his position cannot stand as the logically tight construct that he repeatedly asserts that it is.

I. A HYPOTHETICAL CASE

Let us suppose that a state legislature decides to restrict motorists' use of gasoline by enacting a statute allowing drivers to purchase gasoline only on weekdays if their license plate is odd-numbered and only on weekends if their license plate is even-numbered. The even-numbered drivers, constituting about half the motorists in the state, will thus effectively be restricted to purchasing gasoline on Saturdays, or in other words will have one fifth the opportunity to purchase of the drivers who have odd-numbered plates. We can assume that this statute is not an attempt to reduce lines at service stations (actual statutes have done this by, for example, allowing odd-numbered plates to purchase gasoline on odd-numbered days), but rather to cut down on total gasoline consumption. We can further assume that the legislature calculated that the great difficulty of purchase now imposed upon even-numbered drivers will reduce total gasoline consumption by the desired amount in that state.

Suppose now that the even-numbered drivers bring a class-action suit to declare the statute unconstitutional. Have they been denied substantive due process? No, because the means selected by the legislature to reduce gasoline consumption is rationally related to its goal. In fact, it is probably cheaper than the alternative of issuing ration points to all drivers. Moreover, since the legislature could **[**pg601] have stopped the sale of gasoline in the state entirely, cutting back on sales by the means chosen was well within the legislature's power.

Instead, the only real complaint that the even-numbered drivers have is that they have not been treated equally with the odd-numbered drivers. Here one can imagine Professor Westen saying, 'But they are not equal—they are different in precisely the difference articulated by the legislature, namely, that they possess license plates that are divisible by 2 whereas the other

drivers do not possess such plates.' To be sure, this is, logically speaking, a difference. But the fact is that the 'difference' selected by the legislature was a random one; it was arbitrary. [FN2] If people are subject to arbitrary classifications, they are not being treated equally. Only if the classifications are nonarbitrary can we agree with Professor Westen that the 'equality' rhetoric falls out, because then the classification defines the relevant difference such that the two groups should now be treated 'unalike.'

If the foregoing example contradicts Professor Westen's thesis, then elaborating it along his lines will worsen the situation and demonstrate the consequences of his mode of analysis. Accordingly, let us elaborate upon the hypothetical case by positing some legislative history that explains why the even-numbered drivers were relegated to the weekends. Suppose that a bill proposing a statute such as the one that was passed was circulated among members of the legislature, and suppose further that those members of the legislature who owned automobiles were split among even-numbered and odd-numbered license-plate owners. Sensing that a bill may be passed in the next session of the legislature, the solons whose plates are even-numbered apply to the Registry of Motor Vehicles for new, odd-numbered plates. When all of them have received their new plates, so that now all legislators have odd-numbered plates, the bill is enacted into law.[FN3] Now we have a real reason for the difference between odd and even. According to Professor Westen, such a reason is the key to why equality analysis is purely formal, since it explains that this legislative classification, like all others, defines the differences between people. But this is precisely what is wrong with his analysis. For while this is an explanation, it does not help take the case out of the Equal Protection Clause. Rather, it puts it even more solidly within that clause.[FN4]

[pg602] II. Is There A Different Normative Standard Anterior to Equality?

Professor Westen has responded to the hypothetical case that I have presented in the first Part of this paper by formulating a prescriptive standard that he believes is logically anterior to any concept of equality:

> The state shall not pursue its ends by imposing a great burden on one class of persons where it could fully achieve its ends by imposing a considerably lesser burden on that or another class of persons. [FN5]

However, his standard is not, and cannot be, a logical presupposition of the idea of equality.

To simplify the analysis, let us assign a burden of 5 to my class of drivers with even-numbered license plates, representing the five days of the week that they cannot purchase gasoline, and a burden of 1 to the odd-numbered class. Professor Westen's standard would require a reduction on the burden of the even class by, for example, lowering it from 5 to 2. But then, in order to fully achieve the state's ends of a reduction in the availability of gasoline, there must be an increase on the odd class from 1 to 4. Thus:

Original hypothetical:
5 (even class) + 1 (odd class) = 6
Westen's standard, first application:
2 (even class) + 4 (odd class) = 6

However, it is now apparent upon inspection that the new arrangement continues to violate the Westen standard, although from the opposite direction. We must apply the standard again, this time reducing the burden on the odd class and increasing it on the even class. If we had no idea of the concept of equality, we would be required to continue applying the standard indefinitely, until at some point we would hit upon an equilibrium position where there can be no further violation of the statutory standard:

Westen standard, final application:
3 (even class) + 3 (odd class) = 6

In brief, the concept of equality is inherent in Westen's standard. The standard is simply a cumbersome way of saying that the two classes of persons must receive equal protection under the law.

Yet one might object that the procedure of successive applications of the standard until equality is reached shows that the standard is anterior to the concept of equality. This objection cannot be maintained, however, due to a hidden assumption in the very procedure [pg603] I described of successive applications of the standard. For the only way we know what direction to move in making reductions and increases in burdens is to have a concept of equality in mind. The only way we can know that one burden is 'great' and another burden is 'considerably lesser,' to use the words in Professor Westen's standard, is to compare the burdens. But comparison presupposes a measure of equality, for we cannot know that one burden is greater than another unless we first have a concept of when the two burdens are equal. [FN6]

Professor Westen's standard, therefore, is logically posterior to the concept of equality. If we start with the Equal Protection Clause, then a standard such as Professor Westen's,[FN7] which he attempts to ground in substantive due process,[FN8] can be given operative content.

Professor Westen's analysis is provocative and extremely useful. It serves the legal profession by employing recent analytical tools developed by philosophers of language. However, as the exchange in this Review may evidence, his first essay was not, contrary to his claim, the 'last analysis.'[FN9]

FOOTNOTES

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**Numbers in the format “pg600” etc. refer to the pagination of the original publication.

[FN1]. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[FN2]. Of course, not all random or arbitrary statutes are violative of substantive due process, for example, a statewide lottery allowing gasoline purchases to the lucky numbers drawn out of a hat, with all motorists having an equal chance.

[FN3]. This hypothetical extension is a variant of Professor Westen's comment on *Morey v.*

Doud, 354 U.S. 457 (1957), that a distinction could have been the greater 'lobbying power' of American Express. Western, *supra* note 1, at 576. (*Morey* was overruled by *New Orleans v. Dukes*, 427 U.S. 297 (1976)).

[FN4]. It is not a violation of substantive due process for the legislators to favor themselves; suppose the statute exempted all legislators (because of the public nature of their duties) from the odd-even restrictions. Thus, in my hypothetical, the reason the legislators voted for the odd numbers was sufficient but not necessary.

[FN5]. Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983).

[FN6]. More precisely, to compare the magnitude of any two sets, place their members into one-to-one correspondence. When this procedure exhausts the members of one set, then that set is equal to the part of the other set that has been exhausted, with the remaining members of the latter set constituting the amount by which the latter set exceeds the former. If at the point of exhaustion of the first set the second set is also exhausted, the two sets are equal.

[FN7]. Any variation in Professor Westen's suggested standard that might avoid the terms 'greater' or 'lesser,' and yet still apply to my hypothetical case, would also presuppose the concept of equality. For instance, if the burdens are imposed 'proportionately upon all affected classes of persons,' proportionality cannot be determined without first defining the mathematical-logical relation of equality.

[FN8]. Westen, *supra* note 5, at 649. The Supreme Court used the Equal Protection Clause of the fourteenth amendment to give content to the Due Process Clause of the fifth amendment in Bolling v. Sharpe, 347 U.S. 497 (1954), invalidating public school discrimination in the District of Columbia. *See* S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER 82-83, 100, 455 n.48 (1977).

[FN9]. Westen, *supra* note 1, at 577 n.136.